The Cochise County Record
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David M Morgan, *pro se*

IN THE COURT OF APPEALS
STATE OF ARIZONA, DIVISION TWO

OFFICE OF THE COCHISE COUNTY ATTORNEY, by and through Cochise County Attorney BRIAN M. McINTYRE, a political subdivision of the State of Arizona, Plaintiff/Appellant, vs. DAVID M MORGAN, an unmarried individual Defendant/Appellee	2 CA CV 2018-0093 ANSWERING BRIEF (revised and corrected) Cochise County Superior Court Case No. CV2017-00670

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STATEMENT OF THE CASE

In refusing to grant a Temporary Restraining Order and Preliminary Injunction, Santa Cruz County Superior Court Presiding Judge Thomas Fink found – contrary to repeated assertions by the Cochise County Attorney - that the underlying case *is* a First Amendment case:

> "overlaying that analysis is also the First Amendment. He got it . . . he wrote about it . . . he disseminated it. And that is First Amendment speech." (transcript pg281 Ln13)

Plaintiff/Appellant Cochise County asked the trial court to order – in advance of trial – that certain news and information be *unpublished* and, implicitly, to prevent future publishing of similar news accounts (of allegations of improprieties in county grand jury proceedings).

Cochise County attempted to establish that Morgan violated criminal and civil laws, and engaged in deception, in obtaining the documents central to the news story and publishing a news story and links to the documents.

Morgan insisted that grand jury secrecy statute did not apply to him in this situation and denied any deceptions or violations of law in obtaining and publishing the news story and documents.

The court found that the grand jury secrecy statute, as the County

Attorney attempted to apply it, was vague and overly broad – unconstitutional. The lack of local rules contributed to that finding.

The trial court found that Morgan had violated no law.

The court found that the County Attorney has legitimate concerns, that there was injury to the integrity of grand jury secrecy, and the court expressed concerns for the effect of publishing of a grand jury exhibit (photo of a deceased victim) on the survivors.

The trial court did ***not*** find that public policy considerations favored the relief sought by Cochise County - because of the First Amendment.

The County Attorney gave notice of intent to appeal the denial of injunctive relief but missed the deadline for filing its Opening Brief. Morgan signaled his desire to have the Court of Appeals consider the matters. The County Attorney sought and obtained this court's approval to re-instate this appeal.

STATEMENT OF THE FACTS

Reporter-publisher David M Morgan of the Cochise County Record published a news story on October 6, 2017 about defense attorney David Wilkison's strong criticism of a June 29, 2017 county grand jury proceeding (in the matter of Roger D Wilson) and publishing a link to the full transcript of those proceedings.

The story headline and sub-headlines of the October 8, 2017 news story, comprised of text and facts culled from a Motion to Remand to Grand Jury filed in Superior Court, reads as follows:

> "due process . . . requires the use of an unbiased grand jury and a fair and impartial presentation of the evidence."
>
> **ATTORNEY: PROSECUTOR "CHERRY-PICKED" STORIES, MISLED GRAND JURY, CCSO DETECTIVE LIED**
>
> - presentation included Wilson's curse words, opinions about the justice system; did not include witness statements about previous fight with JD Arvizu

Criminal defense attorney David Wilkison first came to the attention of reporter-publisher Morgan in August 2017 when Wilkison argued a Motion to Remand in the case of William Doyal Chesmore – completely unrelated to the Roger Wilson case – in the Bisbee courtroom of Cochise County Superior Court Judge Wallace Hoggatt.

During oral arguments in that matter it appeared to Morgan that

Wilkison was astonished, outraged, that the county attorneys office was permitting egregious errors in grand jury presentations. Wilkison told the court:

> "This is a circus show that this guy is doing in front of the grand jury panel." (see footnote this page)

Morgan obtained from the Clerk's office a copy of the (Chesmore) Motion and related documents. Attached to the motion was a copy of the complete grand jury transcript.

Morgan determined that several other attorneys, including some with the county's Public Defenders Office and Legal Defenders Office, also regularly filed Motions to Remand to Grand Jury and attaching some pages, or all, of the transcript of the grand jury proceedings.

Reporter-publisher Morgan had previously identified some such documents in the files safeguarded by the Clerk of the Superior Court for Cochise County and has obtained copies of many of them (before and since these proceedings commenced).

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out-of-county defense counsel David Wilkison, commenting on a police detective's grand jury testimony, and questioning local grand jury practices. Aug 18, 2017 Cochise County Superior Court (oral argument of a second Motion to Remand to Grand Jury in an indigent client's case, S-0200-CR2017-00402 State v William Doyal Chesmore)

In the Chesmore case, the Motion to Remand contained some particularly specific and explosive allegations of misconduct during grand jury presentation by a detective and a prosecutor, all supported by the attached transcript.

A few weeks later, Morgan obtained from Wilkison via e-mail a copy of the transcript of grand jury proceedings in the first Roger Wilson indictment. Morgan mailed a copy to defendant Wilson who had been in jail for eight weeks and still had not seen his attorney nor received any disclosure.

After reading the transcript, reporter-publisher Morgan awaited the filing of a Motion to Remand.

When that document was filed on Oct 6, 2017 reporter-publisher Morgan began preparation of the news story. The Cochise County Record, published only on-line and via e-mail, regularly provides readers with links to police and court documents to help them better understand local court proceedings and news stories.

About a week later, elected Cochise County Attorney Brian McIntyre contacted Morgan by e-mail and asked that the grand jury documents be removed from public availability and the news story be modified to eliminate information derived from those documents.

After a few more days, Morgan responded that he did not believe he had broken any law and would not be modifying the news story or remove the links to the documents.

In December 2017 the Arizona Daily Star published a news story about the controversy and included a link to the Wilson grand jury transcript. In February 2018, the Star published a story about unusual activities of a recent Pima County grand jury and the history of Pima County grand jury use and news reporting thereon.

The news story and document links as published by Morgan and the Cochise County Record remain publicly available.

STATEMENT OF THE ISSUES

1. Does inconvenience and additional expense to governmental units, perceived to be caused be publication of a news story that might show those governmental units in a "bad light", constitute injury or harm under Arizona law?
2. Can criminal defendants be lawfully precluded from sharing the contents of a grand jury transcript with cellmates, family members, friends, clergy, reporters, other (non-retained, non-assigned) counsel, other defendants?
3. Can grand jury members and witnesses be lawfully prohibited *in perpetuity* from discussing with anyone what they observed in a grand jury proceeding to which they were a party?
4. In this case, is the matter of how the documents were obtained relevant to the determination of the appropriateness of injunctive relief?

ARGUMENT

The ***Pentagon Papers*** cases made clear that the government may not prevent publishing news stories about matters of public interest, nor punish for such publishing, even on allegations of "irreparable injury to the defense interests of the United States" – and despite the reporters', editors' and publisher's knowledge that the documents were stolen.

In the ***Times*** case, Justice Hugo Black wrote:

> "[T]he injunction against *The New York Times* should have been vacated without oral argument when the cases were first presented... . [E]very moment's continuance of the injunctions...amounts to a flagrant, indefensible, and continuing violation of the First Amendment. ... The press was to serve the governed, not the governors.
>
> The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government.
>
> The press was protected so that it could bare the secrets of government and inform the people."

In State of Maryland v. Baltimore Radio Show, 338 U.S. 912, 70 S. Ct. 252, 255, 94 L. Ed. 562, the court reminded the government:

> "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."

New York Times Company v. United States (1971), and
United States v. The Washington Post Company et al (1971)

And, in Phoenix Newspapers Inc v Superior Court (1966) our Arizona Supreme Court found that even when a criminal defendant's right to a fair trial was implicated, the First Amendment protections could not be breached:

> What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt.
>
> Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Craig v. Harney, 331 U.S. 367, 374, 67 S. Ct. 1249, 1254, 91 L. Ed. 1546.

In this case, the trial court correctly concluded that reporter-publisher Morgan violated no criminal statute in acquiring the grand jury transcript. And, the trial court concluded that any allegations that Morgan broke *any* laws in publishing the news story and making the grand jury transcript accessible to the public were insufficient to justify the prior restraint contemplated by the relief sought.

The trial court found, in citing *Gentile,* that the risk of discriminatory enforcement was enough to justify the Court's denial of an injunction even if the defendant could not make such a showing in

this case. *Gentile* cites *Grayned v City of Rockford.* According to that Court, vague laws work three evils on people: they may trap the innocent by not providing fair warning; they may lead to arbitrary and discriminatory enforcement; and they may operate "to inhibit the exercise" of First Amendment freedoms.

The public has clear interest in verifying the lawful and just operations of all facets of the criminal justice system, including presentations made to a county grand jury.

The purpose of grand jury secrecy was, in large part, to protect citizens from overzealous and unscrupulous police and prosecutors. If that purpose and the related procedures have been corrupted, that should be exposed - with specific examples. The current arrangement protects police and prosecutors from public scrutiny.

To assume that overwhelmed, county-paid, indigent client defense attorneys will always be diligent in scrutinizing the transcripts of secret proceedings, within the required time limits, is proven folly.

To declare it illegal for a criminal defendant to share with family, friends, other confidants – or a reporter – a copy of the grand jury transcript that resulted in their indictment is to deprive the defendant of potentially valuable independent fact-checking and other input.

And, if such scrutiny happened to be occasionally successful at identifying errors and misconduct by local police and local prosecutors in grand jury proceedings, but discussion and news publishing of such findings is inhibited or prohibited, then the voting public is deprived of meaningful oversight of critical processes in the criminal justice system and information that might be useful in election decisions related to the County Attorney, the Sheriff and city council members who hire and retain chiefs of police.

Many Cochise County officials – including apparently the County Attorney – and a number of local citizens would prefer that local media ***not*** be strong and independent, ***not*** be able to effectively expose and lead challenges to "the way things are done around here" and "business as usual".

It's not surprising that the Cochise County Attorney's Office doesn't understand or fully appreciate the First Amendment. The history of Cochise County officials and powerful political figures with respect to control of public information – and measures taken to avoid public oversight – is extraordinary. Here are just a few examples of the resulting corruption:

- In 1917 Phelps-Dodge hired the Cochise County Sheriff to

illegally arrest and deport 1,300 striking mine-workers and suspected strike supporters in Bisbee. In 1909, Phelps-Dodge had started buying up the mining district papers. By 1925, the corporation owned all of them - including the Bisbee Daily Review.

- In 1995 the Arizona Attorney General's office reported “the day-to-day operations of the Huachuca City Police Department, in particular the special investigations unit, (which) were shoddy and bordered on being unlawful.”

  The AG's report cited Police Chief Dennis Grey for a “total lack of control’ over the operations of the special investigative unit run by [ex-Cochise County Sheriff's Deputy] Patrick M Halloran.

  The AG's office declined to pursue a criminal case against anyone, "in part because the abysmal status of certain case files and accounting procedures would prevent proof of several points beyond a reasonable doubt during a criminal trial," according to Michael Cudahy, chief counsel with the AG's criminal division.

  There was, and is, no newspaper based in the Town of Huachuca City.

- “Cocaine Joe” Borane knew how to hide information, personal and official, and was largely successful at it during 22 years as a Douglas police officer and chief, plus 19 more as a judge.

  The criminal activities of Judge Joe Borane were well-reported in 1999-2000 in the New York Times, as well as Phoenix and Tucson media. But little was reported in Douglas Dispatch or the other very limited local media in the county.

  Today, few citizens of the county can recite (or even find) the basics of the court cases nor comprehend the conditions which permitted a local judge – almost entirely unbeknownst

to the citizens – to become one of Cochise County's largest private landowners, providing property to Mexican drug trafficker Francisco Rafael Camarena for the first major trans-border drug tunnel.

- Bisbee Deputy Police Chief Ed Holly resigned in the wake of an investigation that uncovered a long list of violations that include harassment, misuse of police equipment and lying to his superiors and investigators. So reported the Arizona Daily Star in December 2009

  City officials were set to fire Holly, 58, but he resigned during a meeting this week with Bisbee officials where he could have pleaded his case, said City Manager Stephen Pauken. Holly had been with the Bisbee Police Department for 27 years . .

  An Arizona Daily Star investigation found that Holly made more than $131,000 from 2007 to mid-2009 working border-security overtime shifts in a Department of Homeland Security program called Operation Stonegarden.

  During a one-year period from March 2007 to March 2008, timecards show Holly worked an average of nearly 80 hours a week between regular and overtime hours. Bisbee Police Chief Jim Elkins defended the hours worked, but Bisbee Mayor Jack Porter said he wasn't sure Holly worked all the hours.

  Bisbee's hometown newspaper, the weekly Bisbee Observer, is owned and published by local police family members. Few details of Holly's lies, illegal activities and abuses were published in Bisbee and readily available to local citizens.

- In September 2012, Cochise County Sheriff Larry Dever died legally drunk, in a $100,000 county-owned vehicle, in the Kaibab National Forest – 325 miles from Cochise County.

  A few days after Dever's death his longtime assistant, Teri Nuti, told reporter-publisher Morgan that “the Sheriff was

very protective of his public image".

The Phoenix New Times published an article about Morgan's article about the circumstances of Dever's death.

One of the pictures published by Morgan shows a half-empty bottle of peppermint schnapps in the truck's interior. Morgan says another picture shows a half-empty bottle of Jack Daniels whiskey, while a police report Morgan also published confirms that two liquor bottles were found inside the truck.

A day after the crash, the Coconino County Sheriff's Office said a deputy who arrived at the scene on September 18 didn't notice any open containers of liquor inside the vehicle.

- In Contreras v Morgan and Cochise County (CV2012-00327) Roger Contreras, a Deputy County Attorney (drug unit prosecutor) and candidate for Superior Court judge alleged invasion of privacy and sought injunctive relief to prevent the release of documents in his employment files to Morgan.

  Visiting Judge James Soto found that all of the documents, save one, were subject to Arizona's Public Records Act and ordered them released.

  In January 2014, Soto (then a Santa Cruz County Superior Court judge, now on the Federal bench) answered a U.S. Senate Questionnaire for Judicial Nominees. He cited Contreras v Morgan and Cochise County first in the list of ten most significant cases over which he had presided.

  Local newspapers carried not a word of Contreras v Morgan and Cochise County.

- The Sierra Vista Herald published a few limited stories about the October 2015 resignation of SVPD Cpl Mike Mitchell, the non-criminal investigation of some of his most recent activities, the effects on criminal cases and Mitchell's 2016

suicide.

Other newspapers in the county published nothing on the Mitchell matter.

A non-criminal internal investigation by SVPD resulted in findings that Mitchell had removed evidence from a crime scene to protect a confidential informant and/or himself from exposure of crimes and their sexual relationship.

“He was a very, very effective law enforcement officer. There is no other way to characterize it. He put together very good, very strong cases,” Cochise County Attorney Brian McIntyre told the Sierra Vista Herald at the time of Mitchell's death.

About 20 criminal prosecutions were suspended and many Rule 32 applications provoked by the establishment of Mitchell's credibility problems.

In various accounts by reporter-publisher Morgan of the Cochise County Record, the following information related to the Mitchell matters was made public:

In January 2012, then Cochise County prosecutor Brian McIntyre declared to criminal defense attorney Creighton Cornell that Sierra Vista Police Dept's top drug cop, officer Mike Mitchell, “has no Brady issues . . no “pattern of misconduct”, or incident of dishonesty”

Mitchell failed to appear at a June 2016 evidentiary hearing in an unrelated Post-Conviction Relief proceeding. At that hearing an FBI agent testified by phone from New York City that Mitchell had in 2003 unlawfully used the NCIC databases and misled investigators about the extent of his involvement in illegal schemes of former FBI agent Jeffrey Royer and stock manipulator Anthony Elgindy.

SVPD Chief Tom Alinen had written in a 2013 performance evaluation of Mitchell, “you are one of the best producing

officers we have . . . you are a leader, a mentor . . . It is impressive to watch your K-9's work and how obedient they are to you. (Hint-Hint)"

Alinen began his law enforcement career with the Huachuca City Police Department in1975. Alinen retired in 2015 from SVPD after 37 years with that agency and is now a Commander with the Cochise County Sheriff's Office.

At his January 2015 swearing in as County Attorney (having been appointed to fulfill the term of retiring County Attorney Ed Rheinheimer) McIntyre remarked, "Not bad for a skinny kid from Douglas, Arizona."

- At a 2015 meeting of the County Board of Supervisors, then President of the Board Pat Call asked Chief Civil Deputy County Attorney Britt Hanson if it was true that the Board had long been failing to provide some statutorily required notices of public meetings. Hanson responded, "you know . . in the 15 years or so that I've been advising the Board . . . . I've never lost a minute's sleep over that".

- Asked 4-5 years ago if the county used "target letters" in relation to grand jury investigations, Chief Criminal Deputy County Attorney Doyle Johnstun replied to this reporter via e-mail, "we don't comment on any facet of grand jury procedures".

  When reporter-publisher Morgan began investigating local grand jury practices he found himself to be the target of an investigation. The Cochise County Sheriff's Office attempted to use a subpoena authorized by prosecutor (now County Attorney) Brian McIntyre to obtain from Google all of Morgan's e-mail communications.

  Rebuffed by Google, the Sheriff's Office sought, and obtained from a local Justice of the Peace, a search warrant with the

more limited scope of communications between Morgan and Craig Smith, the foreperson of the county Grand Jury at the time.

Smith, of Huachuca City, asked questions of Presiding Judge James Conlogue about the grand jury's authority to initiate investigations into matters that had not been presented by the County Attorney and what resources were available to the grand jury. Smith then learned that he was also the target of an investigation. Smith asked to be relieved of his commitment to serve the balance of the 120 day grand jury term, and left that position.

After attending several grand jury empanelments, reporter-publisher Morgan could see that in Cochise County the instructions given to new grand jurors was quite limited – four or five hours, or less – before they began hearing case presentations.

- In 2006, responding to this reporter's complaints about problems of access to court documents, elected Superior Court Clerk Denise Lundin said,"I know the law, Mr Morgan, I'm just not comfortable with you having all that information".

  In early 2018, Lundin's successor, elected Superior Court Clerk Mary Ellen Suarez Dunlap was effectively removed from office without voter knowledge or approval.

  Other local officials coordinated with the Arizona Supreme Court's Administrative Office of the Courts to manage the office without her supervision until the next election.

  This occurred after local judges and others became openly frustrated and vocal about filing problems which resulted in problems of access to information, case delays and wasted time for court staff and litigants. Deputy Clerks were found to have inadequate training, non-existent written policies and procedures and to be following "local customs and practices" but not always the law and rules.

> Not a word has been published in Cochise County about the severe problems in the Office of the Clerk of the Superior Court nor the extraordinary measures taken to address them.

By publishing the subject news story, Morgan may have accomplished exactly what the U.S. Supreme Court identified in Sheppard v. Maxwell (384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2D 600) as a critical function of the press:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries.
>
> The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

Unpublishing news materials which have been provided to thousands or tens of thousands of persons - many whose identities are unknown and many who likely shared the materials with others - is essentially impossible. Thus, the apparent goal of the civil action and request for Order that would almost certainly be ineffective in providing relief is to make Morgan, and perhaps others, fearful of publishing news and documents which might embarrass or annoy county officials.

The chilling effect of such official actions on discussion of matters of

public interest (priorities, policies and procedures of the County Attorney, particularly regarding grand jury presentations) is clear. The threat of repetitious, expensive, time-consuming litigation is implicit. Cochise County's threats of arrest of the publisher are explicit.

CONCLUSION

The County Attorney failed at the trial court to establish that any perceived or possible harms to the lawful operations of the criminal justice system in Cochise County, caused by publishing the news article and related documents, outweigh Morgan's First Amendment rights.

The County Attorney fails in this forum to prove any significant error by the trial court.

Defendant-Appellee Morgan PRAYS THIS COURT to DENY Plaintiff's Interlocutory Appeal.

RESPECTFULLY SUBMITTED this 31st day of December, 2018.

David M Morgan

Original of this document was filed this 31st day of December, 2018 with the Clerk of the Court of Appeals, Div Two via the e-Filer system .

Copy of the foregoing delivered this 31st day of December, 2018 to:

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By: David M Morgan

Certificate of Compliance

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The document attached to this Certificate does not exceed the word limits imposed by Rule 14, Arizona Rules of Civil Appellate Procedure.

/s/ David M Morgan